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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ALFREDO GARCIA LEDESMA, Defendant and Appellant.	2d Crim. No. B211334 (Super. Ct. No. 1283964) (Santa Barbara County)

Alfredo Garcia Ledesma appeals from judgment of conviction upon a no contest plea. He was charged with two counts of aggravated sexual assault of a child under 14 years of age (Pen. Code, § 289, subd. (a) [sexual penetration by force or threat] in violation of § 269, subd. (a)(5).)[1] He pled no contest to two counts of the lesser included offense of forcible sexual penetration (§ 289, subd. (a)(1)) in exchange for an agreed upon aggregate sentence of 12 years in state prison .

Appellant contends that the charges against him were barred by the applicable statute of limitations; that the trial court erred because it did not exclude his involuntary statement to police; and that he received ineffective assistance of trial counsel

[1] All statutory references are to the Penal Code unless otherwise stated.

because counsel did not obtain an evidentiary hearing on the admissibility of the statement.

The prosecution filed a motion to dismiss the appeal. We deferred ruling pending completion of briefing. We conclude that appellant's guilty plea operated to foreclose review of his contentions, and we dismiss his appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant sexually molested a child under age 14 between March 1996 and March 1998. The child first reported this to a school counselor in April 2008. A Santa Maria police officer contacted appellant by phone in July 2008, and interviewed him the next day. Appellant made an incriminating statement. The interview was summarized in a police report and recorded on a digital video disc (DVD). A complaint was filed against appellant in July 2008.

Appellant was initially charged with one felony count of violating section 288.7, subdivision (b), a statute that was not in effect between 1996 and 1998. The error was corrected on the day of appellant's first appearance when the prosecution filed a first amended complaint charging one count of forcible sexual penetration of a child (§ 289, subd. (a) in violation of § 269, subd. (a)(5)) and one count of continuous sexual abuse of a child (§ 288.5, subd. (a)).

Appellant filed a demurrer to the first amended complaint on the ground that the charges were time barred because the prosecution could not establish the requirements for tolling pursuant to section 803, subdivision (f) (independently corroborated substantial sexual conduct).[2] In response to the demurrer, the prosecution filed a second amended complaint, which omitted the charge of continuous sexual abuse and instead charged two counts of forcible sexual penetration of a child. (§ 289, subd. (a) in violation of § 269, subd. (a)(5).) The trial court overruled the demurrer to the first

[2] Appellant's brief mistakenly referred to subdivision (g), which applies only to cold hit DNA cases.

amended complaint without prejudice to a demurrer to the second amended complaint.[3] The court arraigned appellant on the second amended complaint and appellant pled not guilty, reserving the right to challenge the pleading.

Appellant filed a "Notice of Motion and Motion for Demurrer and Motion to Strike and to Suppress Involuntary Confession/Admission." He asserted that the charges of the second amended complaint were time-barred, and he sought to strike them for lack of predicate evidence of substantial sexual contact. He sought to exclude his statement to police on the ground that it was rendered involuntary by promises of leniency and was taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

The trial court overruled the demurrer and declined to make a determination on the voluntariness of appellant's statement "unless and until a motion is filed for that purpose and an Evidence Code Section 402 hearing is held." One week later appellant entered a no contest plea to reduced charges. Appellant did not request a certificate of probable cause. He filed a notice of appeal from the court's order denying his "Demur and Motion to Strike."[4]

DISCUSSION

Review of appellant's contentions is foreclosed by his no contest plea, which admitted every element of the crimes, and by the absence of a certificate of probable cause.

A guilty or no contest plea admits every element of the crime and forecloses review on any issue relating to guilt or innocence. (*People v. Jones* (1995) 10

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[3] Appellant contends the prosecution never obtained leave to file the first amended complaint. The first amended complaint was accepted for filing on July 21, 2008, the day of appellant's first appearance and the reporter's transcript is not included in the record. The change to the charges is reflected in the subsequent clerk's minutes. "[E]rror is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record. [Citations.]" (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

[4] He also gave notice of intent to appeal from sentencing, but he has not challenged his sentence on appeal.

Cal.4th 1102, 1109, disapproved on other grounds in *In re Chavez* (2003) 30 Cal.3rh 643, 656.) Issues relating to the jurisdiction of the court or legality of the proceedings may be reviewed (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178), but only after the appellant has obtained the trial court's certification that those grounds are not clearly frivolous, with two exceptions not applicable here: grounds that occur after entry of the plea and do not challenge its validity and grounds that involve a search and seizure that was contested under section 1538.5. (§ 1237.5; Cal. Rules of Court, rule 8.304(b).)

Appellant's contention that his statement was involuntary and was taken in violation of *Miranda* is foreclosed by his plea in which he admitted every element of the crimes. (*People v. Brown* (1981) 119 Cal.App.3d 116, 124-125.)

Appellant's contention that the charges against him were barred by the statute of limitations is not reviewable without a certificate of probable cause. (*People v. Smith* (1985) 171 Cal.App.3d 997, 1001.) It is also without merit. Prosecution for violation of section 269, an offense punishable by life in prison, may be commenced at any time. (§ 799.) **5**

An order denying a motion to suppress evidence under section 1538.5 is reviewable without a certificate of probable cause (Cal. Rules of Court, rule 8.304(b)(4)(A)), but appellant did not move to suppress his statement under section 1538.5, nor could he have. A motion to suppress shields a defendant only from violations of his or her Fourth Amendment right to be free from unreasonable search and seizure. (*People v. Brown, supra*, 119 Cal.App.3d at p. 124; *People v. Massey* (1976) 59 Cal.App.3d 777, 781.) Appellant's request to exclude his statement was based solely on Fifth Amendment grounds. There is no evidence in the record that appellant's statement was the fruit of any Fourth Amendment violation.

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5 Appellant is incorrect when he contends that the charges were punishable by a maximum of eight years in prison. That is the maximum punishment for violation of section 289, subdivision (a)(1) when it is not committed on a child. Section 269, subdivision (b) authorizes life in prison for violation of 289, subdivision (a) against a child.

Appellant's contention that counsel rendered ineffective assistance when he did not request an Evidence Code section 402 hearing on the voluntariness of appellant's statement is also foreclosed without a certificate of probable cause (§ 1237.5; *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245) and the record does not demonstrate any deficient performance by counsel. Legitimate tactical reasons for taking the deal that was offered when it was offered are evident from the record.

Appellant asserts that he reserved his right to appeal ". . . the denial of any and all motions made and denied in my case" in the written plea agreement. He did not. He specifically waived the right to appeal. The excerpt appellant quotes reads, in full, "I understand that unless I give up the right to appeal, the law allows me to appeal the sentence I receive in this case, as well as the denial of any and all motions made and denied in my case. I waive and give up my right to appeal."

DISPOSITION

The prosecution's motion to dismiss the appeal is granted.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

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